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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HENRY G. BARR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether denying guilt is a crime against the United States under 18 U.S.C. § 1001.

II. Whether in order to avoid unconstitutional application, 18 U.S.C. § 1001 must be interpreted to exclude a false denial of illegal drug use made by a public employee in responding to a background investigation, where refusing to answer the question would subject the respondent to economic sanctions.

III. Whether a defendant's status as a public official is a legally sufficient factor to justify a significant upward departure under the sentencing guidelines, in the absence of evidence that the defendant in any way abused or otherwise compromised the responsibilities of his office.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Henry G. Barr respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered on May 15, 1992.

OPINIONS BELOW

The opinion of the court of appeals is reported at *United States v. Barr*, 963 F.2d 641 (3d Cir. 1992) and is reproduced in the Appendix, *infra*, at 1a. The district

court's opinion denying pre-trial motions is unpublished and is reproduced in the Appendix at 32a.

JURISDICTION

Petitioner was charged by indictment in the United States district court with violating federal criminal statutes. Judgment of conviction was entered on May 30, 1991. 32a. On May 15, 1992 the court of appeals entered its judgment affirming the conviction, but vacating sentence. 1a-31a. Petition for Rehearing In Banc was denied by order entered June 24, 1992. 38a.

The jurisdiction of this Court to reveiw a judgment of the court of appeals is invoked under 28 U.S.C. § 1254(a) and Supreme Court Rule 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

18 U.S.C. § 1001

§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

In July, 1988 Petitioner Henry Barr was a partner in a law firm in Harrisburg, Pennsylvania. He entered private practice after having previously served as Assistant United States Attorney for the Western District of Pennsylvania, Deputy Attorney General for the Commonwealth of Pennsylvania, and General Counsel to the Governor of Pennsylvania. In all of these positions he had served under Richard Thornburgh.

When Edwin Meese resigned as Attorney General of the United States, Richard Thornburgh was nominated by the President to succeed him. In July of 1988 Barr was contacted by several of his former colleagues in government and asked to join Attorney General Designate Thornburgh's transition team. Barr refused the overtures, citing his unwillingness either to relocate his family or to leave his wife and infant son behind in Pennsylvania.

After receiving a number of additional phone calls, including a call from Attorney General Designate Thornburgh, and meeting with several of his former colleagues, Barr ultimately agreed to assist in the transition from the tenure of Attorney General Meese to that of his former mentor. He resigned his partnership and moved to Washington, leaving his wife and son in central Pennsylvania.

Before assuming his position as Assistant to the Attorney General, Barr had completed a Standard Form 171, "Application for Federal Employment". Standard Form 171 included questions about prior criminal convictions, but did not inquire into uncharged or unadjudicated criminal conduct. The form was completed and submitted to the Department on August 28, 1988. On September 6, 1988 Barr assumed his position at the Department.

Approximately a week after Barr began his work at the Department, he unexpectedly received a Standard

Form 86, "Questionnaire for Sensitive Positions", with instructions to complete and return the form to the security officer. The Standard Form 86 turned out to be the opening volley of an investigation to determine whether Barr should be given a security clearance, which the Attorney General believed necessary to performance of his duties. The form's printed instructions stated that failure to answer any question could affect "employment or clearance prospects".

Question 24b of Standard Form 86 asked: "Do you now use or supply, or within the *last 5 years* have you used or supplied marijuana, cocaine, narcotics, hallucinogenics, or other dangerous or illegal drugs?" (Emphasis in original). Not coincidentally, five years is also the applicable period of limitations for criminal prosecutions related to controlled substances.[1]

Barr answered Question 24b by typing an "x" in the space marked, "no". The answer was false.

The next step in the process was a full field investigation by the FBI. On November 1, 1988 Special Agent Justin Bowers interviewed Barr and reviewed the written answers Barr had provided on the SF-86. Barr verbally confirmed his prior answers, including his denial of illegal drug use within the preceding five years. Special Agent Bowers testified that had Barr admitted past drug use, Bowers would have been required to report the admission and to initiate a full criminal investigation. After the field investigation was completed, Barr was given a final security clearance.

Barr remained with the Department for approximately nine months. On April 27, 1989 he submitted his letter of resignation to the Attorney General, citing his desire to return to his family in Pennsylvania. The resignation was effective May 12, 1989.

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[1] Under 18 U.S.C. § 3282 the limitations period for all non-capital federal offenses is five years.

Within the year following his resignation, the government learned that Barr had used cocaine approximately a dozen times between 1984 and 1987. On August 10, 1990 a federal grand jury seated in the Middle District of Pennsylvania returned a four-count indictment against Barr. Counts I and II of the indictment charged Barr with making false written and oral statements to the government regarding his use of illegal drugs, in violation of 18 U.S.C. § 1001.[2] Count III charged Barr's participation in a conspiracy to possess cocaine from 1984 to 1987, in violation of 21 U.S.C. § 846. Court IV charged simple possession of cocaine on one occasion in April, 1989.

Prior to trial Barr moved to dismiss Counts I and II of the indictment, contending that prosecution was barred by the "exculpatory no" doctrine, under which a number of circuits have held that exculpatory denials of criminal misconduct are not false statements within the scope of section 1001. The motion was denied. In lieu of an opinion, the district court adopted the government's brief in support of its holding. 38a. A jury was sworn on February 4, 1991, and the case proceeded to trial. At the close of evidence a defense motion for judgment of acquittal was denied. The jury ultimately returned verdicts of guilt on all counts.

On May 30, 1991 Barr was sentenced to 16 months imprisonment on each of the false statement counts and 12 months imprisonment on each of the misdemeanor drug counts, all sentences to run concurrently. 42a. The sentence represented a four-level upward departure under the sentencing guidelines.

By Order and Opinion filed May 19, 1992, the court of appeals affirmed the judgment of conviction, but vacated

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[2] Although the underlying conduct occurred in the District of Columbia, during pre-indictment negotiations the parties agreed to venue in the Middle District of Pennsylvania.

the judgment of sentence under *Burns v. United States*, —— U.S. ——, 111 S.Ct. 2182, 115 L.Ed.2d 123 (1991) for lack of notice of the district court's intent to depart under the sentencing guidelines. 1a-31a.

In affirming the judgment of conviction the court of appeals held that if the "exculpatory no" doctrine were viable as a limiting construction of section 1001, it would not apply to bar prosecution, because Barr had "initiated" the government's inquiries through his "quest for government employment". 11a. In reaching its conclusion the court relied generally on the five-part formulation of the "exculpatory no" doctrine first developed in the Ninth Circuit and later adopted by the Fourth and Eighth Circuits. 8a.

The issue whether denying guilt is a crime against the United States under section 1001 is the principal question presented for review.

The appeal also presented both procedural and substantive challenges to Barr's sentence. Substantively, the only factor relied on by the district court to justify the four-level departure was Barr's "high ranking position". 36a. Barr contended that factors related to his employment and to the potential for abuse of public trust (the district court had found none) had already been taken into account under the sentencing guidelines and that his status as a public official could not legally justify the departure. The court of appeals held that the contested factor was legally sufficient to support the departure. 27a. Sentence was vacated and remanded based on lack of notice of the district court's intent to rely on that factor in departing from the guideline range. 29a.

The legal sufficiency of the departure factor is a further question presented for review.

A Petition for Rehearing In Banc was timely filed and was denied by Order entered June 24, 1992. 37a.

REASONS FOR GRANTING THE WRIT

I. GIVEN THE IRRECONCILABLE CONFLICT AMONG FEDERAL COURTS REGARDING APPLICABILITY OF THE "EXCULPATORY NO" DOCTRINE TO PROSECUTIONS UNDER 18 U.S.C. § 1001, GUILT OR INNOCENCE IS PRESENTLY DETERMINED MORE BY VENUE THAN BY FIXED STANDARDS OF PROOF.

The criminal offense defined under 18 U.S.C. § 1001 is the making of any false statement to the government regarding any matter within the jurisdiction of any agency or department.[3] The question presented is whether denying guilt, in response to potentially incriminating questions asked by government agents, is a false statement within the meaning of section 1001.

The "exculpatory no" doctrine was first articulated as a limiting construction of section 1001 in *United States v. Stark*, 131 F.Supp. 190 (D.Mass. 1955) (exculpatory denials are not affirmative "statements" within the meaning of section 1001) and first recognized on the circuit level in *Paternostro v. United States*, 311 F.2d 298, 305 (5th Cir. 1962) (mere negative responses to potentially incriminating questions by government agents are not

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[3] The predecessor statute to section 1001 applied only to false statements which caused the government to suffer pecuniary loss. In 1934 the Secretary of the Interior sought an amendment to enable him to prosecute "hot oil frauds" under the statute. The Department's regulatory function was being frustrated by producers' falsification of interstate shipment documents, but since the fraud involved no pecuniary or property loss to the government, the conduct was not prosecutable under section 1001. The statute was amended to eliminate the requirement of pecuniary or property loss, resulting in the broad statutory language at issue here. *See, United States v. Gilliland*, 312 U.S. 86, 92, 61 S.Ct. 518, 85 L.Ed. 598 (1941) (reviewing legislative history). The statute was most recently reviewed by this Court in *United States v. Rodgers*, 466 U.S. 475, 104 S.Ct. 1942, 80 L.Ed.2d 492 (1984) (affirmative misrepresentations to Federal Bureau of Investigation within section 1001).

within section 1001. Citing earlier cases on the statute's legislative history, *Paternostro* found it inconceivable that Congress intended the statute to reach false denials of guilt.

The doctrine has since cut a canyon's course through the law of at least eight circuits, generating considerable controversy among legal commentators along the way.[4] On one side of the divide are circuits which apply the doctrine as a safeguard against applications of section 1001 that are "uncomfortably close to the Fifth Amendment," [5] the premise being that prosecutions for false denials of guilt are inconsistent with the privilege against compelled self-incrimination.[6] Cases giving primacy to Fifth Amendment values do so, in part, on the theory that punishing people for lying in response to incriminating questions would give impetus to "inquisition as a method of criminal investigation." [7]

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[4] *See*, Comment, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U.Chi.L. Rev. 1273 (1990); Note, *Judicial Reluctance to Enforce the Federal False Statement Statute in Investigatory Situations*, 51 Fordham L. Rev. 515 (1982); Note, *Prosecutions for False Statements to the Federal Bureau of Investigation—the Uncertain Law*, 29 Syracuse L. Rev. 763 (1978); Note, *Criminal Liability for False Statements to Federal Law Enforcement Officials*, 63 Va.L.Rev. 451 (1977); Note, *Fairness in Criminal Investigations Under the Federal False Statement Statute*, 77 Colum.L.Rev. 316 (1977); Note, *Constitutionally Privileged False Statements*, 22 Stan.L.Rev. 783 (1970).

[5] *United States v. Lambert*, 501 F.2d 943, 946, n.4 (5th Cir. 1974) (*en banc*).

[6] *United States v. Payne*, 750 F.2d 844, 863 (11th Cir. 1985).

[7] *United States v. Bush*, 503 F.2d 813, 815 (5th Cir. 1974). *See, also, United States v. Payne, supra*, 750 F.2d at 863 (doctrine is shaped by a "solicitude for Fifth Amendment values", further holding that the government should not "be allowed to coerce a person into admitting wrongdoing, on pain of prosecution"); *United States v. Fitzgibbon*, 619 F.2d 874, 881 (10th Cir. 1980) (critical factor in application of the doctrine is the potential for self-incrimination).

This constitutionally driven version of the "exculpatory no" doctrine is applied in the Fifth, Tenth and Eleventh Circuits.[8] Under this application of the doctrine, whether a false response to governmental inquiries falls within section 1001 depends on the potential for incrimination inherent in the inquiry itself.

Petitioner's false denial of guilt would not be within section 1001, as the statute is construed in the Fifth, Tenth and Eleventh Circuits, because the denial was made in response to questions that were plainly incriminating.[9]

Other cases have excluded exculpatory denials from section 1001 on the theory that the statute was intended to cover only affirmative misrepresentations. This analysis has produced inconsistent results. In order to justify application of the doctrine, detailed affidavits have been characterized as "simple denials".[10] Purporting to apply the same distinction, the Second Circuit held that "any statement beyond a simple 'no' does not fall within the exception".[11] Presumably, the affiants in the first case would have been convicted in New York. The First Circuit initially accepted the distinction between simple denials and affirmative misrepresentations,[12] only to abandon it later over concerns about the "arbitrariness of a

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[8] *See*, cases cited in notes 5, 6, and 7, *supra*.

[9] In an unpublished opinion filed April 15, 1992, a district court in the District of Columbia enjoined the Defense Department from using a security clearance form almost identical to the SF-86 on grounds that the form violated the Fifth Amendment. *National Federation of Federal Employees v. Greenberg*, No. 91-2894 (D.D.C. 1992) (Opinion, April 15, 1992). The injunction remained in effect as of this Petition's writing.

[10] *United States v. Bush*, 503 F.2d 813, 819 (5th Cir. 1974) (Roney, J., dissenting).

[11] *United States v. Capo*, 791 F.2d 1054, 1069 (2d Cir. 1986).

[12] *United States v. Cheevor*, 526 F.2d 178 (1st Cir. 1975).

court-drawn line between affirmative and exculpatory negative responses".[13]

On the other side of the divide is the "five-part test" developed in the Ninth Circuit and subsequently applied in the Fourth and Eighth Circuits.[14] This version of the "exculpatory no" doctrine draws certain conclusions about legislative intent and attempts to balance them against the Fifth Amendment concerns identified in the earlier cases. Under this standard section 1001 does not apply where the declarant's statement: (1) is unrelated to a claim or privilege against the United States; (2) is made in response to inquiries initiated by an agency of the federal government; (3) does not impair the basic functions entrusted by law to the inquiring agency; (4) was not made in response to an inquiry comprising part of the agency's regular exercise of administrative responsibility; and (5) if truthfully answered, would tend to incriminate the declarant. Under the court of appeals' application of this test, the plainly incriminating nature of the question Henry Barr was required to answer was not sufficient to take his denial outside the scope of section 1001.

The five-part test has intensified the centrifugal dynamics of "exculpatory no" analysis.

The distinction between investigative and administrative inquiries, for example, has produced wildly divergent results. The Fourth Circuit has held that questions by a Secret Service agent investigating a claim for a replacement tax refund check were "investigative" in nature, and prosecution was therefore barred under the doctrine.[15] On almost identical facts, the Ninth Circuit held

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[13] *United States v. Poutre*, 646 F.2d 685, 686 (1st Cir. 1980).

[14] *See, United States v. Equihua-Juarez*, 851 F.2d 1222, 1225 (9th Cir. 1988) (defining five-part test); *United States v. Cogdell*, 844 F.2d 179, 183 (4th Cir. 1988) (applying five-part test); *United States v. Taylor*, 907 F.2d 801 (8th Cir. 1990) (same).

[15] *United States v. Cogdell, supra*, 844 F.2d at 184.

that questions by a Secret Service agent investigating a claim for a replacement social security check were "administrative", and the doctrine was not applied.[16] Within the Ninth Circuit itself, an inquiry by DEA agents about illegal drugs was characterized as "administrative",[17] while a border patrol agent's request for biographical data was found to be "investigative".[18] Denying guilt to the DEA was found to be a false statement within section 1001; supplying a false name to the border patrol was not.

Applying the standards of the Fifth, Tenth and Eleventh Circuits to these cases would produce a third, distinct profile of results.

The requirement that the statement be made in response to inquiries "initiated by the government" has also spawned irreconcilable decisions. In the border patrol case, the defendant was charged under section 1001 after giving a false name in response to an inquiry by a border patrol agent. The court held that the operative inquiry, *i.e.*, the request for biographical data, had been initiated by the government. The doctrine was therefore applied to bar prosecution.[19] That result cannot be reconciled with the precedent established in the case at bar. Based on the rationale applied in this case, the Third Circuit would have found that the defendant in *Equihua-Juarez* initiated the inquiry simply by showing up at the border.

Regarding impairment of agency function under the five-part test, courts have resorted to holding that investigative functions are not impaired by lies, because government agents do not really expect truthful responses to investigative inquiries.[20]

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[16] *United States v. Olsowy*, 836 F.2d 439 (9th Cir. 1988).

[17] *United States v. Goldfine*, 538 F.2d 815, 828 (9th Cir. 1976).

[18] *United States v. Equihua-Juarez*, *supra*, 851 F.2d at 1227.

[19] *Ibid.*

[20] *United States v. Equihua-Juarez*, *supra*, 851 F.2d at 1227; *United States v. Cogdell*, *supra*, 844 F.2d at 184.

Recently the Sixth Circuit *en banc* acknowledged the need for a limiting construction of section 1001, but rejected the five-part test as unworkable.[21] The court left open the question whether *Paternostro's* simpler standard might be viable in that circuit. The case was decided by a 9-6 vote. Five separate opinions were written by members of the court.

It is intolerable for the fundamental question of guilt or innocence to be so determined by arbitrary factors, rather than by fixed standards of proof. It is respectfully submitted that a writ of certiorari should issue to resolve the question whether, and under what circumstances, the "exculpatory no" comprises a false statement within the scope of section 1001.

If the writ were to issue, Petitioner would contend that the controversy should be resolved by returning to the rather elegant simplicity of the doctrine's original premise: denying guilt is not a crime against the United States. Exculpatory responses to potentially incriminating questions are not false statements within section 1001. That standard would be responsive to legislative intent and would define the statute's boundaries in a manner consistent with Fifth Amendment concerns. It would also provide the clarity and predictability of result lacking under current law.

In addition, the construction would protect the government's legitimate administrative need for information. The government argued below that access to information regarding drug use is critical to ensuring the suitability of candidates for high-level positions. Petitioner fully agrees. This Court has previously held that the government has every right to *compel* its employees to answer questions relevant to their performance or positions, *provided* the answers cannot subsequently be used against the employee for purposes of criminal prosecution. *Lefkowitz*

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[21] *United States v. Steele*, 933 F.2d 1313, 1321 (6th Cir. 1991) (*en banc*).

v. Cunningham, 431 U.S. 801, 808, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977). *See, also, Lefkowitz v. Turley*, 414 U.S. 70, 81, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973) (immunity is required to reconcile Fifth Amendment principles with the need for information); *Minnesota v. Murphy*, 465 U.S. 420, 436, n.7, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) (same).

Where respondents are advised that their answers would not be available for use against them in criminal proceedings, the potential for incrimination is removed. If the questions are not potentially incriminating, the limiting construction of the statute would not apply. Such a resolution would actually further the government's interest in obtaining truthful information "to assure the effective functioning of government", *Lefkowitz v. Turley, supra*, 431 U.S. at 808, in that respondents are more likely to answer with candor when the fear of incrimination is removed.

The conflict among federal courts regarding application of the "exculpatory no" doctrine has become intolerable. The more the courts below look at the issue, the more confused it becomes. Resolution is required, and only this Court can provide it.

Petitioner therefore respectfully requests that a writ of certiorari issue to review the judgment of conviction under 18 U.S.C. § 1001.

II. WHERE A PUBLIC EMPLOYEE IS THREATENED WITH ECONOMIC SANCTIONS FOR REFUSAL TO ANSWER QUESTIONS ABOUT PAST DRUG USE, HIS OR HER FALSE DENIAL OF GUILT CANNOT, CONSISTENT WITH FIFTH AMENDMENT PRECEDENT FROM THIS COURT, SERVE AS THE PROSECUTION UNDER 18 U.S.C. § 1001.

In a line of cases over the past quarter century, this Court has consistently held that the government may not threaten economic sanctions, including the loss of employment and professional standing, as a penalty for in-

voking the privilege against self-incrimination. *See, Lefkowitz v. Turley, supra*, 414 U.S. at 80 ("in the context of threats of removal from office the act of responding to interrogation [is] not voluntary"); *Gardner v. Broderick*, 392 U.S. 273, 279, 88 S.Ct. 1912, 20 L.Ed.2d 1082 (1968) (Fifth Amendment cannot abide any "attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment"); *Lefkowitz v. Cunningham, supra*, 431 U.S. at 808 (statute under which person could be removed from political office for refusing to waive privilege found unconstitutional; lawyer's loss of professional standing resulting from loss of office impermissible penalty for invocation of privilege); *Garrity v. New Jersey*, 385 U.S. 493, 497, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967 ("option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent"); *Spevack v. Klein*, 385 U.S. 511, 515, 87 S.Ct. 625 (1967) (threatened loss of professional standing, reputation and livelihood as penalty for assertion of the Fifth Amendment privilege impermissible).

The majority of these cases involved public employees or public contractors threatened with the loss of position or standing for a refusal to answer incriminating questions. Under these cases the *attempt* to compel incriminating statements by the threat of economic sanctions is itself constitutionally offensive, and the "mere possibility" that the government may have profited from the attempt is not tolerated. *Minnesota v. Murphy, supra*, 465 U.S. at 444; *Gardner v. Broderick, supra*, 392 U.S. at 279.

The printed instructions to the Standard Form 86 advise respondents that failure to answer any of the questions "may affect your employment or clearance prospects". That statement threatens economic sanctions for refusal to answer the government's inquiries, including the potentially incriminating inquiry of Question 24b.

The respondent is therefore confronted with a trilemma, as Henry Barr was. A truthful answer to Question 24b would have incriminated him. Refusing to answer would likely have cost him his job and jeopardized his career. A false answer exposed him to prosecution under section 1001.

The government profits by any choice the respondent makes. The profit here was a felony prosecution under section 1001.[22]

This Court has held that, "in the context of threats of removal from office the act of responding to interrogation [is] not voluntary." *Lefkowitz v. Turley*, *supra*, 414 U.S. 80. If the government is to be prevented from profiting by its attempts to subvert the Fifth Amendment, that rationale should be applied to bar prosecution under section 1001 for false denials of guilt.

Permitting section 1001 to be applied to "exculpatory no" responses under these circumstances would be constitutionally offensive. It would also produce a result inconsistent with this Court's authority in *Lefkowitz v. Turley*, *Gardner v. Broderick*, *Garrity v. New Jersey*, *Lefkowitz v. Cunningham*, *Minnesota v. Murphy*, and *Spevack v. Klein*, cited *supra*.

Petitioner therefore respectfully requests that a writ of certiorari issue to review the judgment of conviction under 18 U.S.C. § 1001.

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[22] These are the same factors that impelled a district court to enjoin use of a similar form by the Defense Department. See, note 9, *supra*.

III. WHETHER A DEFENDANT'S STATUS AS A PUBLIC OFFICIAL IS LEGALLY SUFFICIENT TO JUSTIFY A SIGNIFICANT UPWARD DEPARTURE UNDER THE SENTENCING GUIDELINES PRESENTS AN IMPORTANT QUESTION.

The only factor relied on by the sentencing court in sentencing Petitioner to a term of imprisonment which was double the maximum term allowed under the guideline range was his status as a public official. 46a. The court of appeals found this factor to be legally sufficient to support the departure. 27a. To open the field to evaluation of a defendant's "status" as grounds for departure would create a disruptive precedent. On the facts presented, it is also contrary to law.

18 U.S.C. § 3553(b) provides that the court cannot depart from the guidelines range on the basis of factors which have already been taken into account by the guidelines. The guidelines explicitly state that a defendant's employment does not afford a basis for departure from the guidelines. U.S.S.G. § 5H1.5. Further, the "public trust" is addressed in U.S.S.G. § 3B1.3, which provides for an upward adjustment of two levels where the offense conduct reflects an abuse of a position of public trust.

The sentencing court found absolutely no evidence that Henry Barr had in any way abused or otherwise compromised the responsibilities of his office. Attorney General Thornburgh testified at trial that Barr was "an excellent lawyer who always fulfilled the responsibilities that were given to him." The prosecutor conceded that there was no suggestion that Barr had discharged his responsibilities with anything other than the highest degree of professionalism. The Department's counsel for intelligence policy confirmed Barr's professionalism and integrity.

The bare fact of Barr's *status* as a public official, unrelated to any suggestion that he in any way compro-

mised his public responsibilities, should not be approved as a factor justifying departure.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Filed May 15, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5486

UNITED STATES OF AMERICA,

v.

HENRY G. BARR,

Appellant.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal Action No. 90-00239)

Argued: November 19, 1991

Before: MANSMANN, COWEN and ROTH,
Circuit Judges

(Opinion Filed May 15, 1992)

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OPINION OF THE COURT

ROTH, *Circuit Judge.*

Henry G. Barr appeals to this court the judgment of conviction and sentence entered in the district court on May 30, 1991. Barr was indicted on August 10, 1990, by a federal grand jury sitting in Harrisburg, Pennsylvania. The indictment charged Barr with making a false written statement in violation of 18 U.S.C. § 1001 (1988) (Count One); a false oral statement in violation of 18 U.S.C. § 1001 (1988) (Count Two); conspiracy to possess cocaine in violation of 21 U.S.C. § 846 (1988) (Count Three); and possession of cocaine in violation of 21 U.S.C. § 844 (1988) (Count Four). At his arraignment on August 22, 1990, Barr entered a plea of not guilty. His trial began on February 4, 1991. On February 7, the jury returned a verdict of guilty on all counts.

The district court sentenced Barr to a term of sixteen months imprisonment on Counts One and Two, and twelve months imprisonment on Counts Three and Four, to be served concurrently. Following this period of incarceration, Barr was sentenced to a two-year term of supervised release. A fine of $2,500 was also imposed for each of the counts.

On June 6, 1991, Barr appealed his conviction and sentence to this court. We have jurisdiction of this appeal

pursuant to 18 U.S.C. § 3231 and 28 U.S.C. § 1291. Barr cites eight grounds for the appeal: (1) the false statements charged in Counts One and Two fall within the "exculpatory no" doctrine, and so cannot provide a basis for conviction under 18 U.S.C. § 1001; (2) there was a fatal variance between Count Three of the indictment, which charged a single conspiracy to possess cocaine, and the proof at trial, which demonstrated multiple conspiracies; (3) the evidence was not sufficient to establish beyond a reasonable doubt that the substance in question in Count Four was cocaine; (4) Count Two of the indictment was multiplicitous; (5) the district court erred in denying discovery of documents relevant to the claim of selective prosecution; (6) Count Four should have been severed from the other three counts; (7) the district court's upward departure of four guideline levels in sentencing Barr was in violation of federal law; and (8) the district court erred in failing to adjust Barr's sentence for acceptance of responsibility.

After considering each of Barr's first six grounds for appeal, we find them to be without merit. We will discuss in detail two of these grounds, the "exculpatory no" doctrine, and the question of whether the proof under Count Three demonstrated multiple conspiracies, rather than a single conspiracy, to possess cocaine. With regard to the sentencing claims, we reject Barr's argument that the district court erred in failing to adjust Barr's sentence for acceptance of responsibility. For the reasons we will set forth below, however, we conclude that the district court in sentencing Barr failed to give him the requisite notice of its intent to depart from the sentencing guidelines. Consequently, we will vacate Barr's sentence and remand the case to the district court for resentencing.

The Relevant Facts of Record.

The relevant facts may be summarized as follows. From September 6, 1988, to May 12, 1989, Henry Barr served as an Assistant to the Attorney General of the

United States in Washington, D.C. In this position Barr acted as a liaison with law enforcement agencies and carried out assignments, given to him by the Attorney General, which related to pending matters within the criminal and intelligence communities. In addition, Barr was responsible for briefing the Attorney General on Foreign Intelligence Security Act cases. Consequently, Barr had access to sensitive information relating to intelligence and law enforcement areas.

Before assuming his duties as Assistant Attorney General, Barr completed Standard Form 171, entitled "Application for Federal Employment." This form includes questions concerning prior criminal convictions but does not address any unchanged or unadjudicated criminal conduct. In addition, persons appointed to sensitive positions in the Department of Justice are usually required to complete Standard Form 86 (SF-86) prior to taking the position. This form includes specific questions concerning the applicant's drug use and offers a warning to the applicant that failure to provide truthful answers could result in criminal prosecution. At the Attorney General's request, the Security Officer of the Department of Justice granted Barr an interim or temporary security clearance, pending the completion of his full-field background investigation. Barr completed the SF-86 form six days after entering on duty as Assistant to the Attorney General.

In response to the SF-86 question, "Do you now use or supply, or within the last 5 years, have you used or supplied marijuana, cocaine, narcotics, hallucinogenics, or other dangerous or illegal drugs?", Barr typed an "X" beneath the word "no." Barr signed the SF-86, certifying that his answers were true.

On November 1, 1988, Barr was interviewed in Washington, D.C., by a Special Agent of the Federal Bureau of Investigation. The Special Agent reviewed the specific questions on the SF-86, and asked Barr if he had ever used

illegal drugs. Bar responded that he had not. The Security Officer relied upon Barr's answers recorded on the SF-86 in deciding to grant a temporary clearance. The Security Officer further relied upon the statements made by Barr in his interview with the FBI special agent in granting Barr a final security clearance.

Barr remained at the Department of Justice for approximately nine months. On April 27, 1989, he submitted a letter of resignation to the Attorney General, citing his resignation was effective May 12, 1989.

After Barr had left the Department of Justice, information that he had used illegal drugs, specifically cocaine, was disclosed during a federal grand jury investigation into drug use by public officials in Pennsylvania. The evidence indicated that Barr had used cocaine in the years 1984 through 1988, and on at least one occasion in 1989, during s employment as Assistant to the Attorney General. Ultimately, in addition to Barr, two former public officials were charged with drug activities as a consequence of this investigation: Richard L. Guida, former Executive Deputy Attorney General for the Commonwealth of Pennsylvania, and W. Michael Trant, former Deputy Attorney General in charge of legislative liaison for the Pennsylvania Attorney General's Office. Other private citizens were also prosecuted.

At Barr's trial, then-Attorney General Richard Thornburgh testified that, had he known of Barr's past cocaine use, he would not have made Barr part of his staff. The Director of Security for the Department of Justice testified that he would not have approved Barr's interim security clearance and would not have recommended final clearance if he had been aware of Barr's past cocaine use. Testimony was also presented concerning Barr's duties within the Department of Justice. Five other witnesses testified that they had used cocaine with Barr on various social occasions from 1984 to 1989. On February 7, 1991, the jury returned a guilty verdict on all counts.

On May 30, 1991, Barr appeared before the district court for sentencing. The court found that an aggravating circumstance existed which had not adequately been taken into consideration by the Sentencing Commission in formulating the sentencing guidelines, specifically that Henry Barr had held a high-ranking position within the Department of Justice and that criminal activity by public officials tended to erode public confidence in government. As a result, the court concluded that an upward departure of four levels to a guideline range of 10-16 months was appropriate. Barr was sentenced to 16 months imprisonment on both of the felonies and to 12 months imprisonment on both of the misdemeanors, all sentences to run concurrently.

I. The "Exculpatory No" Doctrine.

Counts One and Two of the indictment charged Barr with making a false written statement and a false oral statement to the government in violation of 18 U.S.C. § 1001. The underlying false statements are based on Barr's negative replies to questions concerning his illegal drug use, made both on the Department of Justice Standard Form 86 and in response to the November 1, 1988, questioning by the FBI Special Agent.

A conviction under § 1001 requires that five elements be proved: (1) a statement, (2) falsity, (3) materiality, (4) specific intent, and (5) agency jurisdiction.[1] *See United States v. Herring*, 916 F.2d 1543, 1546 (11th Cir.

[1] 18 U.S.C. § 1001 states:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 2248, 114 L. Ed. 2d 488 (1991). Barr does not contend that the Government failed to prove any of these elements, but rather argues that his denials of possession and use of illegal drugs, charged in Counts One and Two as false statements in violation of 18 U.S.C. § 1001, do not provide a basis for conviction under that statute. According to Bar, these denials are encompessed within the "exculpatory no" doctrine, which provides a defense to prosecution under § 1001 if the statements at issue amount to no more than a denial of criminal conduct in response to investigatory questioning by the government.

This court has neither adopted nor rejected the "exculpatory no" doctrine.[2] Thus, we find a review of this doctrine as developed by our sister circuits instructive with regard to the case before us.

The "exculpatory no" doctrine is a judicially created exemption from prosecution under 18 U.S.C. § 1001 for certain negative exculpatory responses to questions posed by investigating government agents. *See United States v. Berisha*, 925 F.2d 791, 796 (5th Cir. 1991); *United States v. Holmes*, 840 F.2d 246, 249 (4th Cir.), *cert. denied*, 488 U.S. 831, 109 S. Ct. 87, 102 L. Ed. 2d 63 (1988). This doctrine, first articulated in *United States v. Stark*, 131 F. Supp. 190 (D. Md. 1955), has more recently been described as an exception, which excludes from the definition of "statements" under § 1001 "mere exculpatory denials" made during government investigations. *See United States v. White*, 887 F.2d 267, 273 (D.C. 1989). The purpose of the "exculpatory no" doctrine has been explained as follows: "section 1001 plays an important role in protecting the effectiveness of government agencies whose functions require them to rely on the accuracy of the information they receive. The statute, however, was not in-

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[2] No circuit has rejected the "exculpatory no" doctrine directly. *See* Comment, *False Statements To Federal Agents: Induced Lies And The Exculpatory No*, 57 U. Chi. L. Rev. 1273 (1990).

tended to compel persons suspected of crimes to assist criminal investigators in establishing their guilt." *United States v. Cogdell*, 844 F.2d 179, 185 (4th Cir. 1988).

The Ninth Circuit Court of Appeals has developed five conditions it deems must be met in order for the exculpatory no" doctrine to be invoked as a defense to a charge brought under § 1001:

> (1) the fales statement must be unrelated to a privilege or claim against the government;
>
> (2) the false statement must have bene made in response to *inquiries initiated by an agency of the federal government*;
>
> (3) the false statement must not impair the basic functions entrusted by law to the inquiring agency;
>
> (4) the inquiries must not have been part of a regular exercise of administrative responsibility; and
>
> (5) a truthful response would have incriminated the declarant.

United States v. Myers, 878 F.2d 1142, 1143-44 (9th Cir. 1989) (citing *United States v. Becker*, 855 F.2d 644, 646 (9th Cir. 1988)) (emphasis added). *See also United States v. Taylor*, 907 F.2d 801, 805-06 (8th Cir. 1990) (applying the Ninth Circuit's five-factor test); *Cogdell*, 844 F.2d at 183 (stating that the five-factor test articulated by the Ninth Circuit appropriately balances the considerations implicated in applying the "exculpatory no" doctrine to a § 1001 prosecution).[3] These factors are listed in the conjunctive; thus, the failure to meet any one of them renders the "exculpatory no" doctrine unavailable to the accused. *Myers*, 878 F.2d at 1144.

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[3] *But see United States v. Steele*, 933 F.2d 1313, 1320-21 (6th Cir.) (rejecting the Ninth Circuit's five-factor test as over-broad), *cert. denied*, —— U.S. ——, 112 S. Ct. 303, 116 L. Ed. 2d 246 (1991).

Other circuits, while not explicitly endorsing this structured five-factor test, have emphasized that a defendant's ability to invoke this doctrine, and so avoid prosecution under § 1001, turns on whether the negative exculpatory denials were made in response to questions in an investigative, rather than an administrative, proceeding. *See White*, 887 F.2d at 273-74 (noting that this doctrine "does not shield from prosecution under section 1001 false responses to questions in an administrative rather than investigative proceeding."); *United States v. Morris*, 741 F.2d 188, 191 (8th Cir. 1984) (noting, in declining to adopt this doctrine, that it does not apply to a routine administrative inquiry); *United States v. Hajecate*, 683 F.2d 894, 900 (5th Cir. 1982), *cert. denied*, 461 U.S. 927, 103 S. Ct. 2086, 77 L. Ed. 2d 298 (1983); *United States v. Fitzgibbon*, 619 F.2d 874, 880 (10th Cir. 1980); *cf. United States v. Payne*, 750 F.2d 844, 863 n.21 (11th Cir. 1985) (rejecting the administrative/investigative distinction in applying the "exculpatory no" doctrine to 18 U.S.C. § 1006, in part because "this distinction is based on the legislative intent behind 18 U.S.C. § 1001"). *But see Steele*, 933 F.2d at 1321 (rejecting the administrative/investigative distinction as "unwarranted").

The idea that the government should not "be allowed to coerce a person into admitting wrongdoing, on pain of prosecution," also has been advanced in support of this doctrine. *Payne*, 750 F.2d at 862. *See also United States v. Lambert*, 501 F.2d 943, 946 n.4 (5th Cir. 1974) ("Undoubtedly the judicial gloss put on § 1001 by the "exculpatory no" decisions originates at least in part from latent distaste for an application of the statute that is uncomfortably close to the Fifth Amendment.").

The protection from self-incrimination afforded by the "exculpatory no" doctrine, however, must be balanced agaist the fact that § 1001 was drafted by Congress in an expansive fashion to promote the "valid legislative interest in protecting the integrity of official inquiries." *United*

States v. Rodgers, 466 U.S. 475, 479-80, 104 S. Ct. 1942, 1946-47, 80 L. Ed. 2d 492 (1984) (quotation and citation omitted). Indeed, in invoking this doctrine, courts necessarily balance "the need for protecting the basic functions of government agencies with the concern that a criminal suspect not be forced to incriminate himself in order to avoid punishment under section 1001." *United States v. Cogdell*, 844 F.2d 179, 183 (4th Cir. 1988).

As noted above, this court has not taken a position on the "exculpatory no" doctrine. We conclude, however, that, given the facts of this case, Barr would not be able to invoke this doctrine, as it has been interpreted in other circuits, as a defense to the violations of 18 U.S.C. § 1001 charged in Counts One and Two of his indictment. Moreover, because we decline to apply the "exculpatory no" doctrine to the facts of this case, we need not decide whether the doctrine is viable under other circumstances. *See Steele*, 933 F.2d at 1315.

An examination of the facts before us demonstrates why the elements necessary to invoke the doctrine do not exist here. Barr contends that he is entitled to the exemption from prosecution provided by this doctrine because he made the false statements "in response to inquiries initiated by an agency of the federal government." He points to the indictment, which charged that after assuming his duties, he was *required* to submit to the investigation. Further, Barr alleges that the statements in question were unrelated to a claim or privilege against the United States because he "did not ask for a security clearance."

We find this argument to be without merit. We agree with the Government's assertion that Barr himself made the decision either "to secure or accept a prestigious appointment with the Office of the Attorney General of the United States." The questions regarding drug use and Barr's resulting false denials were the direct result of his decision to accept employment with the government as

Assistant to the Attorney General. Thus, in effect, Barr himself precipitated the background investigation that led to his false denials of illegal drug use. The policy underlying the judicial creation of the "exculpatory no" doctrine, that of limiting the government's ability to coerce individuals suspected of wrong-doing into self-incrimination during the course of governmental investigations, certainly would not be advanced through protecting persons from prosecution under § 1001 who, like Barr, make false statements in connection with their quest for employment. *See United States v. Taylor*, 907 F.2d 801, 804 (8th Cir. 1990) (explaining the rationale for the "exculpatory no" doctrine: "under certain circumstances, the government may not prosecute an individual for false or fraudulent statements which were made in response to questioning *initiated by the government* where a truthful statement would have incriminated the defendant." (citation omitted) (emphasis added); *United States v. Bush*, 503 F.2d 813, 818 (5th Cir. 1974) (explaining "that there is a valid distinction between negative exculpatory denial of a suspected misdeed and an affirmative representation of the facts peculiarly within the knowledge of the suspect not otherwise obtainable by the investigator."). Thus we conclude that Barr cannot rely upon the "exculpatory no" doctrine to evade conviction under 18 U.S.C. § 1001 for the false statements charged in Counts One and Two of his indictment.

II. Conspiracy Variance

Count Three of Barr's indictment charged a single conspiracy to possess cocaine, beginning in December, 1984, and ending in January of 1988. Barr contends that because each of his alleged co-conspirators denied the existence of an ongoing agreement, the evidence adduced at trial was insufficient as a matter of law to prove the single conspiracy charged. Thus, Barr argues, his conviction under Count Three should be vacated, and a judgment of

acquittal entered. The Government counters that "Barr's pervasive involvement with co-conspirators and his possession of cocaine is sufficient to support an inference that he was aware of an ongoing conspiracy and voluntarily associated himself with it."

We must vacate a conviction if there is a "variance" between the indictment and the proof at trial, to the prejudice of the defendant's substantial rights. *United States v. Salmon*, 944 F.2d 1106, 1116 (3d Cir. 1991) (citing *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239 (1946); *United States v. Kelly*, 892 F.2d 255, 258 (3d Cir. 1989), *cert. denied*, —— U.S. ——, 110 S. Ct. 3243, 111 L. Ed. 2d 754 (1990)), *cert. denied*, —— U.S. ——, 112 S. Ct. 1213, 117 L. Ed. 2d 451 (1992). If "a single conspiracy has been alleged, a variance of proof occurs if the evidence shows merely multiple conspiracies." *Id. See also Kotteakos*, 328 U.S. 750 (1946). This "variance doctrine" is designed to protect a defendant from being tried "*en masse* for the conglomeration of distinct and separate offenses committed by others." *Id.* (quoting *Kelly*, 892 F.2d at 258). The doctrine is intended to prevent a situation in which the jury might "be unable to separate offenders and offenses and easily could . . . transfer[] the guilt from one alleged coschemer to another." *Id.* (quoting *United States v. Camiel*, 689 F.2d 31, 38 (3d Cir. 1982)). In attempting to distinguish single from multiple, conspiracies the Second Circuit, for example, has defined multiple conspiracies as "separate networks operating independently of each other." *United States v. Barlin*, 686 F.2d 81, 89 (2d Cir. 1982).

To determine whether, under the facts of this case, an impermissible variance has occurred, we must review the record in the light most favorable to the government in order to ascertain if a reasonable jury could find the existence of a single conspiracy. *Id.* (citing *Kelly*, 892 F.2d at 258; *United States v. Di Pasquale*, 740 F.2d

1282, 1292 (3d Cir.. 1984), *cert. denied*, 469 U.S. 1228, 105 S. Ct. 1226, 84 L. Ed. 364 (1985)). This court has developed a three-step inquiry to aid such a determination:

> First, we examine whether there was a common goal among the conspirators. Second, we look at the nature of the scheme to determine whether the agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators. Third, we examine the extent to which the participants overlap in the various dealings.

Salmon, 944 F.2d at 1116 (citing *Kelly*, 892 F.2d at 259) (quotations and citations omitted).

Testimony on the conspiracy charge was presented at Barr's trial by five government witnesses, summarized below. Construing this testimony in the light most favorable to the government, we conclude that a reasonable jury could find the existence of a single conspiracy to possess cocaine.

1. Richard Guida.

Guida testified that James Diebold supplied him with cocaine, App. at 254, and that Diebold also supplied Barr with cocaine. App. at 272. Guida described the procedure through which he obtained the cocaine as follows:

> I would either have talked to Jim prior to the weekend, or he would call me, and if he was going to get something for himself, I would make an arrangement that he would pick up something for me also. And then I would go—normally over to his house. It was always—almost always be on a Friday evening and pick it up.

App. at 271. Guida stated that he once ran into Barr at Diebold's house. On that occasion Barr was picking up a

package that looked "very similar" to Guida's cocaine package. App. at 272.

Guida testified that there were several occasions when he met Barr socially, including a "number of occasions" at Barr's house, when he and Barr used cocaine. App. at 263, 267, 270, 273. Further, Guida stated he specifically remembered being with Debra Cron at Barr's house when Barr used cocaine, because he "thought it was unusual for Hank [Barr] to have used a controlled substance around somebody he didn't know." App. at 268.

On cross examination, Guida testified that there was no agreement between him and Barr with respect to sharing cocaine. App. at 284. He also stated that each use of cocaine was a separate and independent event, App. at 284, that he had no ongoing long-term agreement with Barr concerning the use or possession of cocaine, and that he had no agreement with Barr to conceal the usage from others. App. at 285.

2. James Diebold.

Diebold testified that he remembered using cocaine with Barr in 1984, App. at 342, and "that from sometime early to middle 1985, up until maybe late summer of 1986, there were occasions at my house where I'd used cocaine with Henry Barr." App. ae 343. After February or March of 1987, he estimated that he shared cocaine with Barr on two or three occasions. App. at 349. Diebold also testified that on several occasions Guida would call him requesting him to obtain cocaine for them to split, and that on several occasions Barr accompanied Guida to Debold's house, and the three could split the cocaine. App. at 343-44. On these occasions, the three would divide the costs of the cocaine. App. at 344. When Guida was not present, Diebold testified that he provided the cocaine to Barr "gratuitously." App. at 346.

Diebold further stated that in August of 1988 he had a conversation with Barr "about some of the things that

might accompany [Barr's] taking a position such as [Assistant Attorney General], i.e., polygraph, urinalysis, et cetera." App. at 359.

When cross-examined, Diebold stated: "My feeling in regards to each and every event with regard to the use of cocaine, as has been discussed, was that each was an isolated incident, spontaneous and, in my view, without any connection to past and future uses." App. at 397.

3. Melinda Reese.

Reese testified that she dated Guida for a period of two and a half years. App. at 426. She testified that she remembered seeing Barr use cocaine approximately five times at Guida's home, Barr's home, and her own home. App. at 430. When asked if there was a pattern to the cocaine use among herself, Guida, Barr, Barr's wife, and Diebold, Reese responded:

> It was done in the privacy of our homes among a small group of people. And then, at some point, Rick [Guida] started to pick up women. He would bring them. I think that was part of his problem. These women weren't necessarily long-term girlfriends, and I think they probably talked."

App. at 436.

On cross examination, Reese testified that she never overheard Barr and Guida enter into an agreement to use cocaine, App. at 453, and that there was no pattern to the cocaine use of Guida, the Barrs, and herself. App. at 453. Reese also stated that, with regard to Barr in particular, each cocaine use was a separate incident. App. at 454.

4. John Connelly.

Connelly testified that he used cocaine with Barr and Diebold on one occasion in 1985. App. at 468. Connelly referred to this use as "no big deal." App. at 469.

When cross-examined, Connelly stated that there was no connection between that incident and any other time that he used cocaine, that he was not privy to any ongoing agreement to use cocaine, and that there was no agreement to hide and use cocaine. App. at 471.

5. Debra Cron.

Cron testified that she dated Guida for a period of six months in 1985. App. at 474. She testified that in June of 1985 she and Guida went to Barr's house and used cocaine with Barr and his wife. Cron stated that she and Guida went to Barr's house again a few weeks later, and again used cocaine. App. at 479-80.

On cross-examination, Cron testified that the first incidence of cocaine use with Barr had not been planned, that there was no connection between that use and the second incident, and that she was not privy to any ongoing agreement to use cocaine. App. at 487.

We find that each step of the three-part inquiry developed by this court to aid in the variance determination supports the jury's finding of a single conspiracy.

First, both Guida and Diebold recounted the procedure through which Diebold would supply Barr and Guida with cocaine. Diebold explained that the three would often divide the cost of the cocaine. Furthermore, each of the government witnesses detailed a variety of occasions on which he or she shared cocaine with Barr. Thus the evidence adduced at trial supports a conclusion that there was a common goal among Barr and the government witnesses to possess cocaine.

Second, based on the testimony, a reasonable jury could conclude that the agreement "contemplated bringing about a continuous result that would not continue without the continuous cooperation of the conspirators." In particular, with regard to James Diebold, Richard Guida, and Barr, the "pattern" of cocaine use described at trial

is capable of supporting a reasonable inference that they had entered into a tacit understanding to continue their practice of jointly obtaining and using cocaine. *See United States v. Brown*, 739 F.2d 1136, 1142 (7th Cir.) (stating "It is well settled that a written or spoken agreement among alleged co-conspirators is unnecessary; rather, indirect evidence of '[a] mere tacit understanding will suffice.' ") (quoting W. LaFave and A. Scott, Jr. *Handbook on Criminal Law* § 61, at 461 (1972)), *cert. denied*, 469 U.S. 933, 104 S. Ct. 331, 83 L. Ed. 2d 268 (1984). This inference is reinforced by Mr. Guida's testimony that it was unusual for Barr to use a controlled substance in the presence of someone that he did not know; and by Ms. Reese's testimony that there was a pattern of using cocaine in the privacy of their homes and among a small group of people, and that a problem arose when Guida brought strangers into that group.

Third, the witnesses at trial presented an extensive list of occasions, ranging from major holidays and planned celebrations to informal get-togethers and chance meetings, on which they used cocaine with Barr. Based on this testimony adduced at trial, a reasonable jury could find the requisite overlap in the parties' possession and use of cocaine.

Thus, viewing the evidence in the light most favorable to the government, we conclude that a reasonable jury could have found the existence of the single conspiracy charged in the indictment.

Barr also argues that the district court improperly refused his request for a jury charge on multiple conspiracies. At Barr's trial, the court set forth its rationale for refusing these proposed points of charge. The trial judge explained that he had determined that there was a single conspiracy and that charging multiple conspiracies would only confuse the jury. He went on to state:

> The jury's choice then, is: Is there a conspiracy or isn't there a conspiracy.

App. at 523-24.

Our review of the record has led us to the same conclusion. Because the evidence did not demonstrate either the existence of separate independent networks or that it was likely that the jury would not be able to separate the offenders and the offenses, we find that the trial judge properly refused to give the multiple conspiracy instruction.

Moreover, even if a multiple conspiracies charge should have been given, reversal on appeal is *not* automatic. *United States v. Alkins*, 925 F.2d 541, 554 (2d Cir. 1991). To justify reversal, the appellant must "demonstrate both the likelihood of multiple conspiracies having existed, and substantial prejudice resulting from the failure to give the requested charge." *Id.* (quoting *United States v. Barlin*, 686 F.2d 81, 89 (2d Cir. 1982)). As proof of prejudice, Barr points to the fact that the jury returned on three occasions after the initial charge to ask the court to re-read the definition of conspiracy. In fact, the jury had only two questions concerning this definition. A little over an hour after it had begun deliberating, the jury sent in a note with two questions, the first stating: "Jury would like to have a legal definition of conspiracy as it pertains to this case." App. at 653. In response, the court repeated its earlier instruction on conspiracy. Just over an hour later, shortly before they arrived at their verdict, the jury requested that the definition of conspiracy be read again "slowly" since some jurors had been distracted by commotion in the back of the courtroom when it was repeated before. App. at 658.

We find it an unwarranted leap of logic to infer from these two jury questions either that the jury was confused by a failure of the court to instruct on multiple conspiracies or that Barr was substantially prejudiced by the court's decision not to do so. The logical inference to be drawn from these questions is in fact the issue posited by the trial judge; namely, the jury was attempting to determine whether or not there was a conspiracy.

Even if we were to conclude, therefore, that the district court erred in denying Barr's request, Barr's argument on appeal must nevertheless fail, because he has not demonstrated the requisite substantial prejudice.

III. Sentencing Guideline Departure

The last issue in Barr's appeal which we will discuss at length is the sentence imposed. At the sentencing hearing, the district court departed upward four levels on the basis of what it found to be an aggravating circumstance not adequately taken into consideration by the Sentencing Commission: "the fact that Henry Barr held a high ranking position with the Department of Justice and that criminal activity by public officials tends to erode public confidence in government." App. at 724.

Barr challenges this departure as violating federal law on several grounds. He argues that the four level upward departure cannot be supported by the record, because (1) issues relating to conduct affecting the public trust have already been taken into consideration by the guidelines, (2) the "aggravating circumstance" requisite for departure under the sentencing guidelines did not exist on the facts of this case, (3) the court did not give notice of its intention to depart as mandated by the Supreme Court in *Burns v. United States*, —— U.S. ——, 111 S. Ct. 2182, 115 L. Ed. 2d 123 (1991), and (4) the degree of departure cannot be deemed reasonable.

The procedure for our review of sentencing departures is well-established. District courts are required to impose a sentence within the applicable guideline range unless they find "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." *United States v. Kikumura*, 918 F.2d 1084, 1098 (3d Cir. 1990) (quoting 18 U.S.C. § 3553(b) (1988)). If a district court bases

its decision to depart on a circumstance that has been adequately considered by the sentencing commission in formulating the guidelines, the departure must be reversed on appeal. *Id.* (citing 18 U.S.C. § 3742(f)(1) (1988)). Appellate review of this issue is plenary. *Id.* (citing *United States v. Ryan*, 866 F.2d 604, 610 (3d Cir. 1989)). In determining whether a circumstance has been adequately taken into consideration by the sentencing guidelines, a court "shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. § 3553(b).

We will begin our consideration of this question by examining the documents prepared for the sentencing both by the Probation Office and by the parties.

To assist the Probation Officer in his preparation of the Presentence Report, the defendant submitted Defendant's Version of the Offense, App. at 744-74, and the U.S. Attorney submitted a Sentencing Memorandum, App. at 776-83. The defendant's submission focused on acceptance of responsibility and, in fact, the original Presentence Report awarded Barr a two level reduction in offense level for acceptance of responsibility. App. at 736, ¶ 36. The defendant made no mention in this memorandum of any departure from the guidelines, either up or down.

The U.S. Attorney in his Sentencing Memorandum noted:

> It is the position of the United States that the defendant abused a position of public trust in a manner which significantly facilitated the commission or concealment of the offense. As was testified to at trial, Henry Barr was brought in under a special exemption by the Attorney General. That special exemption and his high position of public trust caused the Security Office of the Department of Justice to give great deference to his representations

> where most applicants are thoroughly investigated *prior* to granting them any access to national security information. Thus, Barr's position of public trust significantly facilitated the concealment of the offense, thereby warranting an increase in his guideline level by two additional levels.[4]

App. at 782. The U.S. Attorney then recommended, "based upon the abuse of the public trust by a high-high-ranking public official as well as the significant security risk that the United States was exposed to by Henry Barr's drug activity and his misrepresentations," that Barr be sentenced to a significant period of confinement. App. at 782-83. No request was made in the government's Sentencing Memorandum for any departure from the guidelines.

In the first version of the Presentence Report, dated March 15, 1991, the Probation Officer noted the Government's request for the two level increase:

> The Government's sentencing memorandum reflects that the defendant abused a position of public trust in a manner which significantly facilitated the commission or concealment of the false statement offenses. The Government contends that Mr. Barr was brought in under special exemption and his high position of public trust caused the security office of the Department of Justice to give great deference to his representations where most applicants are thoroughly investigated prior to granting them any access to nation [sic] security information.
>
> The probation officer does not believe that the enhancement for abuse of a position of public trust is applicable in this case. There is no indication that

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[4] Although the Government does not cite § 3B1.3 of the Guidelines in making this request for a two level increase, we presume the request was made pursuant to this section since the Government tracks its language in the paragraph quoted above.

> the defendant used his position as Assistant to the Attorney General to facilitate his making false statements to the Government. While his position at the Department of Justice may have contributed to that department giving him deference with regard to representations made on an application and during an interview, it does not appear that Mr. Barr took any affirmative or overt action to conceal his false statements or to hinder his background investigation.

App. at 735.[5] As we note above, the Probation Officer also included, in his calculation of the Offense Level in this original version of the Presentence Report, a two level reduction reflecting what he found to be Barr's acceptance of responsibility.

At the conclusion of the Presentence Report, Paragraph 68, Factors That May Warrant Departure, the Probation Officer commented that the Court could increase the sentence above the guideline range "if the defendant committed the offense in order to facilitate or conceal the commission of another offense." He commented that Barr's false statements concealed his past possession of cocaine but noted that the increase in offense level resulting from the application of the multiple counts provisions may have adequately addressed this matter. The Probation Officer concluded by stating that he had "identified no other factors warranting a departure." App. at 742-43.

On April 5, 1991, the U.S. Attorney sent a letter to the Probation Officer, commenting on the Presentence Report. He objected to the award of a two level reduction in the offense level for acceptance of responsibility. He then turned to Barr's violation of public trust:

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[5] These two paragraphs appear again in the Addendum to the second revision of the Presentence Report as the Probation Officer's response to the Government's Objection to the failure to give a two level increase for "Role in the Offense." App. at 866.

> Second, beyond Mr. Barr's failure to give any meaningful acknowledgement of guilt, of the consequences of his conduct and of its effect upon law enforcement efforts in this country, the Pre-Sentence Report does not, in the Government's view, accord sufficient recognition of the importance of the high position of public trust violated by Henry Barr. In fact, the Report makes no distinction between Mr. Barr and a gas station attendant, for example, in terms of his actions or his responsibility. Mr. Barr was an Assistant to the chief law enforcement office [sic] of the United States and handled criminal and intelligence matters. The seriousness of Mr. Barr's conduct in light of the access he had to highly sensitive law enforcement information and to national security information needs to be addressed and underscored both by your office and by the Court.

App. at 786. The U.S. Attorney also commented in this letter on the advisability of an upward adjustment of two levels for obstruction of justice, relating to the 1986 investigation of Richard Guida.

The Probation Officer issued a revised Presentence Report on April 8, 1991. He amended his previous calculations of the offense level to delete the two level reduction for acceptance of responsibility because the materials and post-trial statements submitted by the defendant did "not completely meet guideline criteria." App. at 793. Paragraph 68, Factors That May Warrant Departure, was identical to the Paragraph 68 included in the March 15 version of the report. App. at 800.[6]

The defendant responded to this revised report by objecting to the failure to award the two level reduction for acceptance of responsibility.

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[6] The April 8 revision does not include the customary Presentence Report Addendum of the Probation Officer, discussing and/or resolving the objections of the parties to that report.

On April 18, 1991, a second revised Presentence Report was issued by the Probation Office. Again, a two level reduction for defendant's acceptance of responsibility was not granted. In this second revised report, the Probation Officer calculated a Total Offiense Level of 8, calling for two to eight months imprisonment. Paragraph 68, Factors That May Warrant Departure, remained the same. App. at 865.

In the Addendum to the April 18 report, the Probation Officer noted that the Government had identified four objections in its Sentencing Memorandum and letter. One of these had been resolved by disallowing the reduction for acceptance of responsibility. The other three objections were described as referring to 1) Paragraph 19 of the report, Adjustment for Role in the Offense; 2) Paragraph 13, Adjustment for Obstruction of Justice; and 3) Paragraph 68, Factors That May Warrant Departure. Concerning the objection to Role in the Offense, the Probation Officer repeated the two paragraphs from his March 15 Report on abuse of a position of public trust, including his conclusion that enhancement for abuse of such a position was not "applicable in this case." App. at 866.

In his comments in regard to the third Government objection, the Probation Officer stated:

> In its letter, the Government also contends that the presentence report fails to accord sufficient recognition to the unique combination of offense and Governmental position in the defendant's case, and indicates that these aggravating circumstances need to be addressed by both the probation office and the Court. *There is the inference that the circumstances may warrant an upward departure.*
>
> In response, the probaton officer notes that the grounds for departure listed in Section 5K2.1 through 5K2.15 of the Guidelines generally involve actual con-

> duct or tangible consequences as justification for an upward departure. Although there may have been the potential for abuse, there is no evidence that Mr. Barr compromised his position while in Government service. As noted by the Government, a defendant's employment background is not ordinarily relevant to guideline calculations. The matter raised by the Government may be better addressed, if at all, through imposition of a sentence within the applicable guideline range rather than through an upward departure.

App. at 867 (emphasis added).

The Probation Officer concluded the section addressing the Government's objections by commenting that these objections would need to be resolved by the Court.

At the sentencing hearing, the district court denied both the Government's requests to increase and the defense's request to decrease the Probation Officer's calculated Total Offense Level of 8. In doing so, the judge commented that

> the Probation Officer resolved all of the objections correctly, and for the reasons that have been communicated to the parties in the pre-sentence report. And we accept the reasons of the Probation Officer in their resolution and will affirm the resolution in each instance by the Probation Officer.

App. at 705.[7] After resolving the objections, the trial judge determined that he would depart upward from the guidelines in imposing sentence. He found that

> aggravating circumstance exist [sic] that was not adequately taken into consideraiton by the Sentencing

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[7] The judge later also stated that he "denied the requests of the government to increase this range for the reasons offered and previously addressed by me. And we've denied a defense request to reduce for the acceptance of responsibility." App. at 723-24.

> Commission in formulating the guidelines. The calculated guideline range gives no consideration to the fact that Henry Barr held a high ranking position with the Department of Justice and that criminal activity by public officials tends to erode public confidence in government. As an Assistant to the Attorney General, Henry Barr served as a liaison to various law enforcement agencies. He was responsible for reviewing sensitive and classified information related to criminal and intelligence matters. For these reasons, the Court is departing upward four levels to a guideline range of 10 to 16 months.

App. at 724.[8]

Barr's first argument in support of his appeal of the sentence is that the issues relating to his employment and to conduct affecting the public trust already have been taken into consideration by the sentencing guidelines and, therefore, the reasons articulated by the district court are insufficient to justify the departure under § 3553(b). Specifically, he points to guideline § 3B1.3 which provides: "If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by two levels." Barr argues that this section reflects the Commission's judgment that it is not the "position" that should be considered in imposing judgment of sentence, but whether or not the position is used to facilitate the commission of an offense.

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[8] Sentencing Guidelines § 5K2.0 states:

> Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

It may be correct that § 3B1.3 itself speaks directly only to those abuses of public trust that facilitate the commission or concealment of an offense. We do not agree, however, with Barr's contention that the language of this section reflects the Commission's considered judgment that a combination of high-ranking position and criminal activity other than that which specifically falls under § 3B1.3 can never be deemed the type of aggravating circumstance that justifies departure under § 3553(b). Our review of the guidelines, policy statements, and the relevant commentary leads us to the opposite conclusion. In fact, the guideline's general application principles for departure state that, with the exception of several factors not applicable to Barr's case, "the Commission does not intend to limit the kinds of factors, whether or not mentioned Procedure 32 requires a district court to provide reasonable notice that it is contemplating departure from the sentencing guidelines "on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government." Such notice must "specifically identify the ground on which the district court is contemplating an upward departure." *Burns*, 111 S. Ct. at 2187.

To resolve this question, we must look to the record developed prior to and during the sentencing hearing. We have described above the various communications between the attorneys and the Probation Officer. As a result of our review of these documents, we find that Barr's claim regarding notice has merit. The Government nowhere directly requests a departure. The only reference to a likelihood of departure is the Probation Officer's finding of an "inference" in the Government's April 5, 1991, letter that "the circumstances" of the unique combination of offense and Governmental position in Barr's case may warrant an upward departure. App. at 867. This "inference" is not endorsed by the Probation Officer; he is of the opinion that the matter "may be

better addressed, if addressed at all, through imposition of a sentence within the applicable guideline range rather than through an upward departure." *Id.* Thus, the Probation Officer, finding just an "inference" of such a contention by the Government, does not deem a departure appropriate or give the defendant sufficient notice that a departure is sought.

Moreover, even if one might have considered the "inference" to be a request by the Government for departure, the trial court at the sentencing hearing resolved the Government's objections by adopting the determinations of the Probation Officer, including perforce the recommendation that "abuse of position" would be better addressed through imposition of a sentence within the applicable guideline range. One must assume from the language of the court that it was considering all objections, including the Probation Officer's response to the inferred Government objections to Paragraph 68, Factors that May Warrant Departure. As the court stated,

> In this case I spent some time, after reviewing the report, in conferring with the Probation Department and doing some independent research. We're wrong sometime and we're right sometime. But, after our research, and an examination of these objections, as well as the arguments that were made here today, I'm perfectly satisfied that the Probation Officer resolved all of the objections correctly, and for the reasons that have communicated to the parties in the pre-sentence report. And we accept the reasons of the Probation Officer in their resolution and will affirm the resolution in each instance by the Probation Officer.

App. at 705.

When the court then announced the upward departure due to aggravating circumstances not adequately taken into consideration by the Sentencing Commission in for-

mulating the guidelines, i.e., that "Henry Barr held a high ranking position with the Department of Justice and that criminal activity by public officials tends to erode public confidence in government," App. at 724, the court, as a consequence of its prior resolution of the objections to the Presentence Report, already had eliminated the Government's "inferred" grounds for departure. It is not clear to us how the grounds cited by the court for departure in fact differ from the Government's "inferred" grounds. However, it is exactly because this is not clear that the defendant could not have had adequate notice either that the court was contemplating departure or, if so, of the grounds for that departure. In effect the court decided the factual and legal predicates for departure without notifying the parties. Such a procedure is now forbidden by *Burns*. Consequently, we will vacate Barr's sentence and remand to the district court for resentencing, with instructions both to provide Barr with the requisite notice of any ground on which the court contemplates an upward departure, and to determine the degree of departure from the guidelines in the manner that it finds appropriate for this case.[9] *See Kikumura*, 918 F.2d at 1113.

IV. Acceptance of Responsibility.

Finally, we reject Barr's contention that the district court erred in denying him a reduction in sentence for acceptance of responsibility. Section 3E1.1(a) of the sentencing guidelines authorizes a reduction of two levels in the sentence of a defendant who "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct."

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[9] Because we find that Barr did not receive adequate notice of the upward departure and are remanding for resentencing on that ground, we will not go on to consider the question of the reasonableness of the departure.

The district court adopted the rationale of the Probation Officer,[10] who suggested that the court deny such a reduction in Barr's sentence for acceptance of responsibility. In making this suggestion, the Probation Officer explained that Barr submitted materials to him indicating that Barr was engaged in unsuccessful plea negotiations with the Government up to the time of trial. During these negotiations Barr expressed willingness to plead guilty to either drug possession or false statement charges. Because no agreement was reached, Barr proceeded to trial "not necessary to deny his offense conduct" but to preserve certain issues for appeal. App. at 856. In the Addendum to the presentence report, the Probation Officer further explained that, after Barr was found guilty, the Probation Officer interviewed him, and requested the he "submit a written statement that would in part provide information relative to the guideline adjustment for acceptance of responsibility. A statement was promptly received, but [the Probation Officer] felt the statement fell short as a direct acknowledgement of essential simple misconduct." [11] App. at 868. Barr later responded affirmatively when questioned by the Probation Officer regarding whether he had committed the offense conduct described in the indictment. *Id.*

On appeal, Barr reiterates the argument that he chose to go to trial only to preserve the issue of the applicability

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[10] As stated above, the court explained that "after our research, and an examination of these objections, as well as the arguments that were made here today, I'm perfectly satisfied that the Probation Officer resolved all of the objections correctly, and for the reasons that have been communicated to the parties in the presentence report." App. at 705.

[11] The court noted at the sentencing hearing that Barr apparently "hedged considerably for the officer to [have] writte[n] that in this report." App. at 697. The court also noted that Barr should have known from experience that the "post trial phase of a case, and when he's being interviewed by the Probation Officer [is] a time for frankness, and that's all the officer was trying to elicit from him." App. at 696.

of the "exculpatory no" doctrine to the facts of his case for appeal, not to contest factual guilt.

Because the sentencing judge "is in a unique position to evaluate a defendant's acceptance of responsibility," we give great deference on review to a sentencing judge's decision not to apply the two-level reduction for acceptance of responsibility to a particular defendant. *See* Guidelines § 3E1.1 application note 5; *United States v. Riviere*, 924 F.2d 1289 (3d Cir. 1991) (appellate review of a district court's determination of this question is under the clearly erroneous standard); *United States v. Singh*, 923 F.2d 1039, 1042-43 (3d Cir. 1991) (a sentencing judge's evaluation of a defendant's acceptance of responsibility should not be disturbed unless it is without foundation).

In light of the entire record, including the parties' conflicting accounts of the course of the pre-trial negotiations, and the Probation Officer's finding that Barr's written statement "fell short as a direct acknowledgement of essential simple misconduct," we cannot say that the court's determination that Barr had not accepted responsibility for his criminal conduct, and therefore was not entitled to a two-level reduction in his sentence, was clearly erroneous.

V. Conclusion

Accordingly, while the judgment itself will be affirmed, the judgment of sentence will be vacated and the case remanded for further proceedings with respect to sentencing consistent with this opinion.

A True Copy:
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Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Criminal No. 90-239
(Judge Kosik)

UNITED STATES OF AMERICA

vs.

HENRY G. BARR

MEMORANDUM

[Filed Nov. 30, 1990]

The defendant has filed numerous pretrial motions which we shall consider in this Memorandum. In each instance, the motions are denied.

Background

The defendant, Henry G. Barr, was indicted on August 10, 1990 by a grand jury sitting in the Middle District of Pennsylvania. Counts I and II charge defendant under 18 U.S.C. § 1001 with making false statements to the Department of Justice concerning his use or involvement with drugs. Counts III and IV charge the defendant under 21 U.S.C. §§ 846 and 844, respectively, with conspiracy to use cocaine and with possession of cocaine.

Defendant served as an Assistant to the Attorney General of the United States in Washington, D.C. In connection with this employment, he was required to submit a Standard Form 86 and to be interviewed by the Federal Bureau of Investigation. In response to a written question on the form and an oral question in his inter-

view, defendant responded in the negative with respect to his use or involvement with drugs.

Information concerning the defendant's involvement with and use of drugs arose during a grand jury investigation into drug use by public officials in Pennsylvania. In addition to the defendant, two other officials were charged with drug offenses: Richard L. Guida, former Executive Deputy Attorney General for the Commonwealth of Pennsylvania, and W. Michael Trant, former Deputy Attorney General in Pennsylvania, who was in charge of legislative liaison. The drug charges against the defendant assert his use of cocaine before his federal employment, and at least on one occasion while employed as an Assistant Attorney General.

I.

A motion to dismiss the indictment offers several grounds: [1] selective prosecution; [2] prosecutorial misconduct; [3] failure to state an offense as to Counts I and II; [4] multiplicity and [5] duplicity.

[1] *Selective Prosecution*

It is defendant's position that other persons similarly situated have not been prosecuted, and that he has been singled out on impermissible grounds in violation of his rights under the Fifth Amendment to the United States Constitution. At this stage of the proceeding, the defendant wishes to have the aid of expanded discovery which would enable him to make a prima facie showing of selective prosecution at a hearing which would follow the discovery.

In support of his request for expanded discovery, defendant avers that "on information and belief" the Department of Justice has had knowledge that other persons submitted false answers in response to Standard Form 86; that persons were not given security clearance after

background investigations "raising the inference" that false answers to questions were provided by others; that despite this "knowledge that false statements had been made" the Department of Justice "never" subjected any "sitting employee" or one "who already left public service" to prosecution; that the prosecutor admits no knowledge of such prosecution, and a Lexis search fails to reveal any prosecutions; that a policy not to prosecute is inferred from language which forms a part of Standard Form 86, and that all of the above information is in possession of the government.

With respect to Counts III and IV, referring to cocaine use, defendant claims the factual basis for these charges is purely "historical;" that the Department of Justice has a policy not to prosecute in such cases, and that such information is in possession of the government. To bolster these assertions, there is reference to media reports. These averments are followed by general assertions comparing the defendant's prosecution with Mayor Marion Barry, and concluding that the defendant is the government's sacrificial offering to the media.

The discovery which the defense seeks is contained in paragraphs five [5] and six [6] of the discovery motion. Generally, the defense seeks evidence of prosecution of persons similarly situated with the defendant, records of policies of the Department of Justice as disseminated to the Middle District of Pennsylvania and the District of Columbia, and particularly (a) all documents, and Standard Form 86 prepared by or related to the evaluation of the Honorable Douglas Ginsberg, First Circuit Court of Appeals; (b) all documents and notes of interviews prepared by or related to the evaluation of Frank McNamara who served as United States Attorney in Boston and (c) similar information related to a "black female FBI agent in New York" in the early to mid-1980's.

The Supreme Court in *Wayte v. United States*, 470 U.S. 598, 607-608, 105 S.Ct. 1524, 1530-1531 (1985)

stated a premise from which our reasoning must begin with respect to an allegation of selective prosecution:

> [1, 2] In our criminal justice system, the Government retains "broad discretion" to to whom to prosecute. *United States v. Goodwin*, 457 U.S. 368, 380, n.11, 102 S.Ct. 2485, 2492, n.11, 73 L.Ed.2d 74 (1982); accord, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248, 100 S.Ct. 1610, 1616, 64 L.Ed.2d 182 (1980). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978). This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptitble to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis for a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.
>
> [3, 5] As we have noted in a slightly different context, however, although prosecutorial discretion is broad, it is not " 'unfettered.' Selectivity in the enforcement of criminal laws is . . . subject to con-

> stitutional constraints." *United States v. Batchelder*, 442 U.S. 114, 125, 99 S.Ct. 2198, 2205, 60 L.Ed.2d 755 (1979) [footnote omitted]. In particular, the decision to prosecute may not be " 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,' " *Bordenkircher v. Yares*, *supra*, 434 U.S. at 364, 98 S.Ct. at 668, quoting *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 505, 7 L.Ed.2d 446 (1962).

The person asserting a claim of selective prosecution bears the burden of demonstrating *prima facie* two factors. First, he must provide *evidence* that persons similarly siuated have not been prosecuted. Second, he must show that the decision to prosecute was made on the basis of an unjustifiable standard, such as race, religion, or the desire to prevent his exercise of constitutional rights. *United States v. Schoolcraft*, 879 F.2d 64, 68 (3d Cir. 1989), *cert. denied* 110 S.Ct. 546 (1989); *United States v. Moon*, 718 F.2d 1210, 1229 (2d Cir. 1983), *cert. denied* 466 U.S. 971 (1984); *United States v. Berrigan*, 482 F.2d 171, 174 (3d Cir. 1973).

In an effort to sustain his burden, the defendant seeks the discovery earlier discussed. The first inquiry confronting us is whether the defense has made a sufficient showing of selective prosecution to be entitled to any discovery. The second inquiry is what showing must the defendant make at this point to entitle him to discovery. The courts have adopted a standard under which a defendant establishes his right to the aid of discovery if he can show that he has a "colorable basis" for selective prosecution. *United States v. Berrios*, 501 F.2d 1207, 1211 (2nd Cir. 1974); *United States v. Berrigan*, *supra*. To make this showing a defendant must allege sufficient facts in support of his selective prosecution claim to take the question past the frivolous state. *Wayte*, 105 S.Ct. at 1539 (Marshall, J., dissenting, citing *Berrios* and *Berrigan*). The "colorable basis" standard is explained in

Berrios, as "some evidence tending to show the existence of the essential elements of the defense." 501 F.2d at 1211.

We agree with the government that the defendant has submitted no evidence as supportive of the allegations. Mere allegations are not evidence to establish a "colorable basis" to warrant discovery. Indeed, the government has demonstrated that others in a similar situation to the defendant have been prosecuted. While the defendant has generally referred to persons who were denied security clearance, he thereby infers that the denial of clearance involved false answers to questions. In his request for discovery, defendant seeks evidence from the government concerning Judge Ginsberg, a former United States Attorney named McNamara, and an unnamed black female FBI agent. Again, there is nothing but a wishful inference that false statements were implicated in those cases. Although an inference may be permissible, it should be a deduction or conclusion which common sense permits to be drawn from facts established by the evidence. Here there is no evidence, and the inference alleged is without foundation. In their reply brief the defense places emphasis on *United States v. Cammisano,* 546 F.2d 238 (8th Cir. 1976) where a discovery request was granted. It should be noted, however, that in that case the defense motion was supported by "affidavits and some evidence." Defendant seeks to embark on a fishing expedition. The effect of allowing discovery here would be to encourage use of the selective prosecution defense as a means of discovery not otherwise permissible.

We shall deny the expanded discovery, and conclude that the defense has failed in its initial burden of proof of providing evidence to sustain the motion for dismissal on the grounds of selective prosecution. Without more, we would violate reasoning of *Wayte, supra.*

[2] *Prosecutorial Misconduct*

The defense motion speaks of pre-indictment prejudice attributable to leaked information from "sources" which include misrepresentations about the case. Following the indictment the defense also claims the prosecutor made prejudicial remarks to the press presuming guilt of the accused.

We feel obliged to reject these arguments. Pre-indictment and post-indictment statements attributable to the prosecution are evidenced by press statements. These are either attributable to a "source" or they quote the representations of the prosecutor during in-court proceedings. One article appearing in the Washington Post, Defense Exhibit "L," reports defense counsel a "angrily" attacking the prosecution as "egregious." The prosecutor responded "here you have a guy with the keys to the kingdom doing cocaine. We don't view this as a drug case—its a corruption case." While better left unsaid by both counsel, we do not feel this isolated refutation of the defense characterization represents such prejudice as to warrant dismissal.

Although no hearing on this issue was requested, and in our view is unnecessary, we shall deny dismissal on the ground of prosecutorial misconduct.

[3] *Other Grounds*

In addition to the above, the defense seeks to dismiss the indictments for failure to state an offense in Counts I and II, multiplicity and duplicity.

We shall deny the motion to dismiss on the aforementioned grounds for the reasons stated in the government's brief and which we adopt here.

II.

In addition to the motion to dismiss discussed earlier, the defense has filed a motion for a bill of particulars,

a motion for additional discovery, and a motion to sever Count IV because it was improperly joined contrary to the provisions of Fed.R.Crim.P. 8(a), and keeping the count in the indictment would be prejudicial under Fed. R.Crim.P. 14.

With respect to the severance motion we need to note that Count III charges a conspiracy between December 1984 and January 1988 to intentionally possess cocaine in violation of Title 21 U.S.C. § 844(a). Count IV similarly charges intentional possession of cocaine in violation of Section 844(a), but states that this offense occurred on or about April 8, 1989, or some fifteen months later than the ending time for the conspiracy. This is of some concern to us because of the possible prejudice to the defendant.

Rule 8(a) permits joinder of offenses against a defendant if the offenses "are of the same or similar character." In this case, they both involve possession of cocaine in violation of Title 21 U.S.C. § 844(a). The government represents that the evidence as to both offenses will at least be overlapping. The time gap, while a factor, is less of a factor where the evidence overlaps. A gap of seventeen months was held to be within an often stated standard of "a relatively short period of time" utilized in *United States v. Lindsey*, 782 F.2d 116, 117 (8th Cir. 1986); *United States v. Rodgers*, 732 F.2d 625, 629 (8th Cir. 1984) [twenty months, also citing other cases].

Defendant is correct in pointing out that even if the charges could be joined, the joinder might be prejudicial under Fed.R.Crim.P. 14. This can be the case if remote charges would not otherwise be independently admissible as other crime evidence under Fed.R.Evid. 404(b). This we are unable to discern at the present time. It might be probative as other crime evidence after a consideration of the balancing process required from the court before such evidence is admitted. As the matter stands, we do not find any prejudice to the defendant. However, the

defense will not be precluded from renewing the motion and objection to the evidence at trial. *See United States v. Lighes*, 593 F.2d 182 (2d Cir. 1979), *cert. denied*, 440 U.S. 972 (1979).

Finally, we shall deny the motion for a bill of particulars and the motion for additional discovery for the reasons stated in the government brief and which we adopt here.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Criminal No. 90-239
(Judge Kosik)

UNITED STATES OF AMERICA

vs.

HENRY G. BARR

ORDER

NOW, this 30 day of November, 1990, it is hereby,

ORDERED, that the pretrial motions of the defendant which have been identified and considered in the accompanying Memorandum are denied.

/s/ Edwin M. Kosik
EDWIN M. KOSIK
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Case Number: 1:CR-90-239

UNITED STATES OF AMERICA

v.

HENRY G. BARR

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

CHARLES F. SCARLATA, ESQ., Defendant's Attorney

THE DEFENDANT:

☒ was found guilty on count(s) One (1), Two (2), Three (3) & Four (4) after a plea of not guilty:

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:1001 & 2	False Statements and Aiding & Abetting	September 1986	Cts 1 & 2
21:846	Conspiracy to Possess Cocaine	December 1984	Ct 3
21:844(a)	Possession of Cocaine	April 1989	Ct 4

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ It is ordered that the defendant shall pay a special assessment of $150.00, for count(s) Cts 1, 2, 3, & 4, which shall be due ☒ immediately

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendants Soc. Sec. No.: 212-40-8218

Defendant's Date of Birth: June 4, 1943

Defendant's Mailing Address:
717 Alberta Avenue
Mechanicsburg, PA 17055

Defendant's Residence Address:
717 Alberta Avenue
Mechanicsburg, PA. 17055

May 30, 1991
Date of Imposition of Sentence

/s/ Edwin Kosik
Signature of Judicial Officer

HON. EDWIN M. KOSIK
U.S. District Judge
Name & Title of Judicial Officer

May 30, 1991
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Sixteen (16) months. This term consists of terms of Sixteen (16) months on each of Counts 1 and 2, and terms of Twelve (12) months on each of Counts 3 and 4. Said terms of confinement are to be served concurrently.

THE EXECUTION OF SENTENCE IS STAYED PENDING APPEAL.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons. ☐ before 2 p.m. on June 7, 1991. The defendant is directed to contact the U.S. Marshal's Office no later than three days prior to the above date to be notified of the place of confinement.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Two (2) years. This term consists of terms of Two (2) years on each of Counts 1 and 2, and terms of One (1) year on each of Counts 3 and 4, all terms to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released

within 72 hours of release from the custody of the Bureau of Prisons.

☒ The defendant shall not possess a firearm or destructive device.

1. The defendant shall participate in a program of testing and treatment for substance abuse as deemed necessary by the Probation Officer.

I MUST ADVISE YOU OF YOUR RIGHT TO APPEAL YOUR CONVICTION AND SENTENCE TO THE UNITED STATES COURT OF APPEALS. IF YOU ARE UNABLE TO PAY THE COST OF AN APPEAL, THEN YOU MAY APPLY FOR LEAVE TO APPEAL IN FORMA PAUPERIS, AND IF APPROVED, COUNSEL WILL BE APPOINTED FOR YOU AND YOU WILL NOT BE REQUIRED TO PAY ANY COSTS.

FINE

The defendant shall pay a fine of $10,000. The fine includes any costs of incarceration and/or supervision.

☒ This amount is the total of the fines imposed on individual counts, as follows:

Ct 1 a fine of $2,500: Ct 2 a fine of $2,500: Ct 3 a fine of $2.500 and Ct 4 a fine of $2,500.

This fine plus any interest required shall be paid:

☒ in installments according to the following schedule of payments:

All fines are due immediately.

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level: 8

Criminal History Category: I

Imprisonment Range: 2 to 8 months

Supervised Release Range: 2 to 3 years

Fine Range: $1,000 to $10,000

The sentence departs from the guideline range

☐ for the following reason(s):

The Court finds that an aggravating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. The calculated guideline range gives no consideration to the fact that Henry Barr held a high ranking position with the Department of Justice and that criminal activity by public officials tends to erode public confidence in government. As an Assistant to the Attorney General, Henry Barr served as a liaison to various law enforcement agencies. He was responsible for reviewing sensitive and classified information related to criminal and intelligence matters. He was involved in preventing criminal activity by public officials. For these reasons, the Court is departing upward four levels to a guideline range of 10 to 16 months.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5486

UNITED STATES OF AMERICA,

v.

HENRY G. BARR,

Appellant.

Before: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, and ROTH, *Circuit Judges*

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular, active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is hereby denied.

BY THE COURT.

/s/ [Illegible]
Circuit Judge

Dated: Jun. 24, 1992